(2020) 12 SEBI CK 0110

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No.477 Of 2018, 397 Of 2019

Hariharan Vaidyalingam And Others APPELLANT

Vs

Securities And Exchange Board Of India RESPONDENT

Date of Decision : 18-12-2020

Acts Referred:

Securities And Exchange Board Of India (Prohibition Of Insider Trading) Regulations, 1992 — Regulation 2(c), 2(e), 2(h), 2(ha)
Companies Act, 1956 — Section 2(13), 4A, 12, 370(1B), 372(11)
Monopolies And Restrictive Trade Practices Act, 1969 — Section 2(g)

Citation : (2020) 12 SEBI CK 0110

Hon'ble Judges : Tarun Agarwala, Presiding Officer;M. T. Joshi, J

Bench : Division Bench

Advocate : Chetan Kapadia, SabeenaMahadik, Rahul Sarda, Pankaj Uttaradhi, Sagar Hate, Aayush Kothari, Sabeena Mahadik, Shyam Mehta, Mihir Mody, Shehaab Roshan

Final Decision : Dismissed

Judgement

M.T. Joshi, J

1. Both the appeals arise out of the same charge of insider trading in breach of the Securities and Exchange Board of India (Prohibition of Insider

Trading) Regulations, 1992 on the same set of facts.

2. Appeal no.477 of 2018 is filed by the appellant aggrieved against the order dated 29th August, 2018 passed by the learned Whole Time Member

(hereinafter referred to as â??WTMâ??) prohibiting the appellant from transacting or otherwise associating with the securities market for a period of

7 years from the date of the said order. Next of the appeal no.397 of 2019 is filed against the order dated 28th June, 2019 passed by the Adjudicating

Officer of respondent Securities and Exchange Board of India (hereinafter referred to as â??SEBIâ??) imposing a monetary penalty of

Rs.1,25,00,000 for violation of the same regulations. Both the appeals were heard together and the present common order is being passed.

3. As can be seen from the record the appellant has from the period 3rd July, 2012 to 30th August, 2012 sold 5,41,482 shares of Multi Commodity

Exchange of India Ltd. (hereinafter referred to as â??MCXâ??)for a total price of Rs.58,87,05,661. It was alleged by SEBI that these shares were

sold while the appellant was having unpublished price sensitive information with him, regarding the sister concern of MCX i.e. National Spot Exchange

Limited (hereinafter referred to as â??NSELâ??). Said NSEL as well as MCX have the holding company Financial Technologies (India) Limited

(hereinafter referred to as â??FTILâ??). The respondent SEBI agreed with the appellant that on 3rd October, 2012 the said information was

published in the Economic Times and, therefore, the transactions afterward were omitted by respondent SEBI from consideration.

4. The submissions of the appellant that the alleged information was not a price sensitive information, that he did not sold the share on the basis of any

such information, that he was not aware of the said information and at any rate the information related to the NSEL and not the MCX were not

accepted by respondent SEBI and the impugned orders were passed. Hence the present appeal.

5. Heard Mr. Chetan Kapadia, Advocate assisted by Ms. Sabeena Mahadik, Mr. Rahul Sarda, Mr. Pankaj Uttaradhi, Mr. Sagar Hate and Mr.

Aayush Kothari, Advocates for the Appellant and Mr. Shyam Mehta, Senior Advocate assisted by Mr. Mihir Mody and Mr. Shehaab Roshan,

Advocates for the Respondent.

6. Learned counsel for the appellant submitted that as held by this Tribunal in Dilip S. Pense Vs. SEBI (order dated 19th November 2009) the charge

of insider trading being one of the most heinous act, the degree of proof required is higher degree of preponderance of probability. However the

impugned orders are passed only on conjectures and surmises.

7. As regards the information in question the same is a show cause notice dated 27th April, 2012 issued by the Department of Corporate Affairs

(DCA) to the NSEL. The said show cause notice records that NSEL was given exemption from operation of the Forward Contracts (Regulation)Act, 1952 for all forward contracts of one day duration for the sale and purchase of commodities trades on its platform in terms of exemptions dated 5th

June, 2007 granted. Further the terms and conditions of grant of permission were not followed. It was observed that as against the terms and

conditions the NSEL has not made it mandatory for the seller to actually deposit goods in the warehouse before he takes the position through a

member of the exchange. No verification was carried by the NSEL in this regard. It was further alleged in the notice that while the exemption was

granted of settlement only for one day in many contracts it exceeded eleven days etc. Therefore, NSEL was directed to explain as to why action

should not be initiated against it for violation of the condition of the notification within 15 days. It was warned that in absence of any explanation the

department would be compelled to withdraw the exemption granted there under. This information remained unpublished till it was published in the

Economic Times as detailed supra.

8. The appellant contended that the said information pertains to the company not in question i.e. MCX of which the shares were sold by the appellant.

As per the respondent SEBI, however, as NSEL and MCX have the common holding of FTIL, the information relates indirectly to MCX which upon

publication would have likely materially affected the price of the securities of MCX as defined in the regulation 2(ha) of the Regulations.

9. The appellant contended that when the notice was issued on 27th April, 2012 by DCA the same could not be visualized as price sensitive

information because when the said information was published as a news report on 3rd October, 2012 on that date the price of the scrip of MCX went

up and not down. This submission was also repelled by respondent SEBI on the ground that regulation 2(ha) requires that the information should be

such a nature, which if published is likely to materially affect the price of the securities of the company. It was observed in the impugned order that as

the impact of notice had the warning that the license of NSEL i.e. the sister company of MCX may be cancelled, it was likely that it would adversely

affect the price of the shares of MCX also. The share price of a day depends on various factors and, therefore, it is not necessary that the publication

of the information in question shall necessarily affect the price. Only likelihood is sufficient.

10. Regulation 2(ha) provides as under:-

â??2(ha) â??price sensitive informationâ? means any information which relates directly or indirectly to a company and which if published is likely to

materially affect the price of securities of company.

Explanation.â?"The following shall be deemed to be price sensitive information:â?

(i) periodical financial results of the company;

(ii) intended declaration of dividends (both interim and final);

(iii) issue of securities or buy-back of securities;

(iv) any major expansion plans or execution of new projects.

(v) amalgamation, mergers or takeovers;

(vi) disposal of the whole or substantial part of the undertaking;

(vii) and significant changes in policies, plans or operations of the company;â??

11. Upon hearing both the sides in our view it cannot be disputed that the information directly had adverse implication so far as NSEL is concerned.

Since the MCX is itâ??s sister company and, under the common holding of FCIL there was likelihood that the information would also have materially

impacted the price of MCX. The submissions of the appellant in this regard that these were separate and independent entities therefore cannot be

accepted.

12. The next issue raised by the appellant is that at the material time he was not concerned with MCX, FTIL or NSEL and, therefore, he had no

knowledge of the above information when he traded in the shares of MCX. According to him he was all the time physically away from India and

resided in Singapore. He was not at all insider so far as the information is concerned.

13. Relevant provisions of PIT regulations i.e. Regulations 2(c), 2(e) and 2(h) are as under:-

â??2(c) â??connected personâ?? means any person whoâ?

(i) is a director, as defined in clause (13) of section 2 of the Companies Act, 1956 (1 of 1956), of a company, or is deemed to be a director of that

company by virtue of sub-clause (10) of section 307 of that Act; or

(ii) occupies the position as an officer or an employee of the company or holds a position involving a professional or business relationship between himself and the company whether temporary or permanent and who may reasonably be expected to have an access to unpublished price sensitive

information in relation to that company:

Explanation:â?"For the purpose of clause (c), the words â??connected personâ? shall mean any person who is a connected person six months prior to

an act of insider trading;â??

â??2(e) â??insiderâ?? means any person who,

(i) is or was connected with the company or is deemed to have been connected with the company and is reasonably expected to have access to

unpublished price sensitive information in respect of securities of a company, or

(ii) has received or has had access to such unpublished price sensitive information;â??

Â â??2(h) â??person is deemed to be a connected personâ??, if such personâ?

(i) is a company under the same management or group, or any subsidiary company thereof within the meaning of sub-section (1B) of section 370, or

sub-section (11) of section 372, of the Companies Act, 1956 (1 of 1956) or sub-clause (g) of section 2 of the Monopolies and Restrictive Trade

Practices Act, 1969 (54 of 1969) as the case may be;

(ii) is an intermediary as specified in section 12 of the Act, Investment company, Trustee Company, Asset Management Company or an employee or

director thereof or an official of a stock exchange or of clearing house or corporation;

(iii) is a merchant banker, share transfer agent, registrar to an issue, debenture trustee, broker, portfolio manager, Investment Advisor, sub-broker,

Investment Company or an employee thereof, or is member of the Board of Trustees of a mutual fund or a member of the Board of Directors of the

Asset Management Company of a mutual fund or is an employee thereof who have a fiduciary relationship with the company;

(iv) is a Member of the Board of Directors or an employee of a public financial institution as defined in section 4A of the Companies Act, 1956; or

(v) is an official or an employee of a Self-regulatory Organisation recognised or authorised by the Board of a regulatory body;

(vi) is a relative of any of the aforementioned persons;

(vii) is a banker of the company.

(viii) relatives of the connected person; or

(ix) is a concern, firm, trust, Hindu undivided family, company or association of persons wherein any of the connected persons mentioned in sub-clause

(i) of clause (c), of this regulation or any of the persons mentioned in sub-clause (vi), (vii) or (viii) of this clause have more than 10 per cent of the

holding or interest;â??

14. Admitted facts in this regard are that the appellant was nominated as director of FTIL on the board of MCX for a period of ten years between

2002 to 2012. According to the appellant, he tendered his resignation to MCX vide letter dated 31st July, 2011. He however failed to show any

acknowledgment of the receipt of the letter. The appellant alternatively contended that the term at any rate was to expire on 28th June, 2012.

Therefore the selling of the shares of MCX by him on 3rd July, 2012 onwards cannot be the result of any unpublished price sensitive information. The

appellant further contended that in fact he resigned from NSEL as well as MCX both and left for Singapore as he was made the Chief Executive

Officer of SMX (a global exchange set up by the FTIL group). As the relevant rule required that the CEO should be at Singapore he started staying

there and in such circumstances the knowledge of the information as regards NSEL cannot be imputed to him.

15. The respondent SEBI did not accept the above explanation. It observed that the appellant had long association with FTIL group as detailed in the

impugned orders. For 2001 to 2011 he was employee of FTIL. Out of it till March 2005 he was Chief Technology Officer. Thereafter he was made

Director-Strategy (non-board). For a period of 6.5 years from May 2005 i.e since inception to December 2011 he was non-independent director of

NSEL. Forward Market Commissionâ??s order dated 17th December 2013 records that he was a key managerial person of NSEL for 2005 to 2010.

It was found that he member of its audit committee. Not only this the record revealed that the appellant was one of the biggest recipients of shares

under ESOP (Employee Stock Option Plan) given by the MCX in the year 2006 and 2008. Respondent SEBI therefore concluded that the appellant

was surely performing certain significant and valuable functions for MCX, FTIL and NSEL as he was the largest beneficiary of the ESOP than other

employees. These facts according to the respondent goes to show that the appellant was and continued to be a core member of the FTIL group and

thus was a connected person. Reliance was placed by the respondent in the judgment of this Tribunal in the case of E. Sudhir Reddy vs. SEBI dated

16th December, 2011 and concluded that as the director of MCX the appellant was a connected person to MCX and the circumstantial evidence

points that the appellant had access to the unpublished price sensitive information. He was acting in dual capacity as a director of NSEL and MCX for

a long period. Thus being a core member of the FTIL group the appellant was a connected person and, therefore, an insider within the definition of

regulation 2(e)of the PIT Regulations, 1992.

16. The appellant has submitted that the branding of all these companies as a group companies, declaring FTIL as a holding company of NSEL and

MCX is wrong. He submitted that FTIL was only a promoter having 26 percent share in MCX likewise NSEL was also only promoted by FTIL. In

the circumstances, the assumption of respondent SEBI that when the appellant was director of MCX he also must have knowledge of the information

in question concerning NSEL is a farfetched logic. Before us reliance was also placed on the ratio of Sameer C. Arora Vs. SEBI (2005) 59 SCL 96

(SAT) that it is necessary that the fact that the person was connected or deemed to be connected has to be established by evidence satisfying the

reasonable standard of proof.

17. Upon hearing both the sides, in our view the facts would show that NSEL as well as MCX were promoted by FTIL. Those were represented as

group companies. The appellant was the nominee director from FTIL for a period of 10 years of MCX as detailed supra. The appellant was director

of NSEL since December, 2011. He was Key Managerial Person (KMP) of it for the financial year 2005-2006 to 2009-2010. He was acting as a

nominee director for FTIL in MCX for a long period. In such circumstances, the inference of respondent SEBI that being a nominee director for FTIL

on the board of MCX the appellant had to take its views and information from FTIL necessarily include access of the information of other sister

concern that is NSEL in which FTIL had 99.9 percent holding, cannot be faulted with. In the circumstances it is reasonably established that he was

connected person.

18. As appellant has sold the shares of MCX during the subsistence of

unpublished price sensitive information respondent SEBI relied on the ratio of

Rajiv V. Gandhi & Ors. VS. SEBI order dated 9th May, 2008 wherein it was observed that if an insider trades in securities of a listed company while

holding unpublished price sensitive information it would be presumed that he traded on the basis of such information unless contrary is established.

19. As the appellant has sold the shares during the period the information remained unpublished and as it is found that he had knowledge of

unpublished price sensitive information, the presumption would be that he sold the shares while holding the said information unless explained contrary.

20. The appellant in this regard explained that he was required to repay some loan of different banks, financial institutions obtained earlier for buying

the shares of MCX, housing repairs, education and expenses of his daughter in U.S.A. etc. Upon making query by respondent SEBI, the appellant

submitted that he paid Rs.6,53,19,114 towards the exercise of his ESOP that is purchase of shares and the quantified profit from the sale of those

shares was Rs.52,28,89,354. The appellant was able to provide the information of utilization of only Rs.19,33,06,662. He was unable to offer any

explanation as to what was the necessity to sell additional shares of Rs.33 crores approximately. This fact, as well as the additional fact that the

appellant did not sell shares of all the scrip he held during that period against his explanation that he shifted to Singapore was the reason for sale of the

shares of MCX was also held to be not logical. Respondent SEBI further found from the statement of the appellant that he had in his portfolio shares

of other companies also. In the circumstances, the sale of shares of MCX only was led to the inference that the appellant have sold those shares

having on the basis of the unpublished price sensitive information.

21. In our view the sale of the shares of MCX only in large numbers without commensurate necessity, by keeping the portfolio otherwise intact would

establish that not only the appellant has unpublished price sensitive information with him but also he sold the shares on the basis of the said unpublished

price sensitive information.

The appellant relied on the ratio of Rakesh Agrawal Vs SEBI (2004) 1 Compl. J. 193 (SAT) as found in Paragraph 137 and 138 to the effect that

mere dealing in securities of the relevant entity is not enough, but it should be found that the dealing was on the basis of the price sensitive information.

On facts of the present case as detailed supra it is found that the appellant dealt in the securities on the basis of the unpublished information.

The appellant relied on the observation of this Tribunal in the case of Manoj Gaur Vs. SEBI Appeal no. 64 decided on 3rd of October 2012 that higher

degree of probabilities is required to establish these facts. On the strength of the facts established we find that the condition is satisfied in the present

case.

The learned counsel for the appellant submitted that selling of shares in graded manner for a long duration would show that those were not sold to

avoid any loss. The trading pattern is also required to be considered as held by the Adjudiacting Officer in the case of one Chandralekha Vs. SEBI

(2012) 2 CompLJ 391 (SAT). However the facts in the present case would show that the information remained unpublished for a long period till it was

published by a news paper. The ratio of the case therefore would not applicable on facts of the present case.

In the circumstances, there is no need to interfere in the impugned orders of the respondent SEBI. Hence the following order.

Appeal nos.477 of 2018 and 397 of 2019 are hereby dismissed without any order as to costs.

22. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor

a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Private Secretary on

behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally

signed copy sent by fax and/or email.